Filed 8/3/10 P. v. Randall CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ERIC GORDON RANDALL, Defendant and Appellant.	C062680 (Super. Ct. No. 08F05812)

In this probation revocation case, the trial court found defendant Eric Gordon Randall violated the terms of his probation by willfully disobeying a lawfully issued protective order that directed him not to strike or assault his former girlfriend. On appeal, defendant contends the protective order was not lawfully issued because the court that issued it had no authority to do so under Penal Code[1] section 1203.097. We conclude that because the court had authority to issue the order under section 1203.1, it was lawfully issued. Accordingly, we

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1 All further section references are to the Penal Code.

reject defendant's challenge to the revocation of his probation and his request that we strike the protective order. We will, however, remand the case to the trial court to grant defendant presentence custody credits pursuant to the recent amendments to section 4019, effective January 25, 2010.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2008, defendant pled guilty to possessing cocaine base in exchange for a grant of probation with 180 days in jail suspended pending completion of a drug treatment program under Proposition 36.[2] Other conditions of probation included that he "[o]bey all laws applicable to [him]."

In February 2009, defendant admitted a drug-related violation of probation. In March 2009, the district attorney filed a petition to revoke defendant's probation based on the allegation that he violated the terms of his probation by violating section 243, subdivision (e)(1) (battery against a cohabitant or a person with whom the defendant has a dating relationship). The allegation arose out of an incident in which T. R., a woman with whom defendant had lived and had a dating relationship, told the police defendant had punched her.

By agreement with the district attorney, on March 26, 2009, defendant admitted he violated probation by committing a domestic violence offense. Pursuant to the agreement, the court

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[2] The minute order of the plea hearing indicates defendant pled no contest, but the reporter's transcript clearly shows he pled "[g]uilty."

(Judge John Winn) reinstated defendant on probation and gave him another chance to complete the Proposition 36 program but added 120 days to his suspended jail term. In addition, defendant agreed to a "written no contact order." Regarding that order, the court explained to defendant that he was "going to get a document today that we call a no contact order. That order means just that, it means no contact, no direct or indirect contact with the person listed on the order. Please make sure to read the no contact order and comply with it."

That same day the court issued a "CRIMINAL PROTECTIVE ORDER--DOMESTIC VIOLENCE" on Judicial Council form CR-160. The box on the form indicating it was an "ORDER POSTTRIAL PROBATION CONDITION (Pen. Code § 1203.097)," rather than an "ORDER PENDING TRIAL (Pen. Code § 136.2)," was checked. The protected person under the order was T. R., and the boxes on the form that prohibited defendant from having contact with T. R. were checked. Defendant did not object to the no contact order or appeal from it.

On April 6, 2009, less than two weeks after the court issued the no contact order, T. R. appeared in court with defendant to request that the court drop the order. The court (Judge Winn) agreed but informed defendant the court was going to issue in its place "a criminal protective order." The court explained to defendant and T. R., "That's an order that allows you folks to be together. What a protective order is is an order indicating that you can only have peaceful contact with [T. R.]. So specifically the order will say you cannot strike,

harm, threaten, or harass [T. R.]. So please make sure to read that criminal protective order and comply with it?"

That same day, the court issued another "CRIMINAL PROTECTIVE ORDER--DOMESTIC VIOLENCE" on Judicial Council form CR-160. Again, the box on the form indicating it was an "ORDER POSTTRIAL PROBATION CONDITION (Pen. Code § 1203.097)" was checked. The "no contact" boxes on the form were not checked. The effect of the order was to direct (among other things) that defendant "must not harass, strike, threaten, [or] assault" T. R. Defendant did not object to the protective order or appeal from it.

On April 21, 2009, just over two weeks after the court issued the protective order, the district attorney filed a petition to revoke defendant's probation based on the allegation that he violated the terms of his probation on or about April 18 by violating section 166, subdivision (a)(4). That statute provides that "[d]isobedience of a valid court order may . . . be punished as contempt . . . , making it a misdemeanor to engage in, among other things, '[w]illful disobedience of the terms as written of any process or court order or out-of-state court order, *lawfully issued* by any court.'" (*People v. Gonzalez* (1996) 12 Cal.4th 804, 816, quoting § 166, subd. (a)(4).)

A hearing on the alleged probation violation was held in June 2009. Viewed most favorably to the court's decision, the evidence showed that on April 18, 2009, defendant threw T. R. to the ground and punched her. In essence, the evidence showed

that defendant disobeyed the criminal protective order the court had issued less than two weeks earlier by striking and assaulting T. R.

Defendant did not contend the criminal protective order was invalid; instead, he argued the prosecution had not proved by a preponderance of evidence that a violation of probation occurred, essentially because at the probation revocation hearing, T. R. had recanted her initial report to police of what happened during the altercation with defendant. The court (Judge Ben Davidian), however, found defendant "did violate the terms and conditions of probation in accordance with the allegations in the petition." The court reinstated defendant on probation but dropped him from the Proposition 36 program and lifted the suspension on his jail term. The court later determined he was entitled to 107 days of actual custody credits.

DISCUSSION

I

The Protective Order Was Lawfully Issued

Defendant contends the trial court erred in finding he violated his probation by violating section 166, subdivision (a)(4) because the criminal protective order he disobeyed when he assaulted T. R. was not "lawfully issued," as required by the statute. He asserts "[t]he record is clear that the court acted only under section 1203.097 when it issued its criminal protective orders," "[b]ut section 1203.097 governs

probation terms only for defendants convicted of domestic violence."

Defendant is correct about the scope of section 1203.097. As relevant here, section 1203.097, subdivision (a)(2) provides that "[i]f a person is granted probation for a crime in which the victim is a person defined in Section 6211 of the Family Code,[3] the terms of probation shall include . . . [¶] . . . [¶] (2) [a] criminal court protective order protecting the victim from further acts of violence, threats, stalking, sexual abuse, and harassment, and, if appropriate, containing residence exclusion or stay-away conditions."

Here, defendant was not granted probation for a crime in which T. R., or any other person described in section 6211 of the Family Code, was a victim. Instead, he was granted probation for possession of cocaine base. Accordingly, defendant is correct that section 1203.097 did not authorize the court to impose a protective order in favor of T. R. as a term of defendant's probation.

The court *did* have such authority, however, under section 1203.1. Under subdivision (j) of section 1203.1, the court can "impose and require . . . reasonable conditions [of probation], as it may determine are fitting and proper to the end that

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3 Section 6211 of the Family Code defines "[d]omestic violence" as "abuse perpetrated against any of" certain categories of victims, including "[a] cohabitant or former cohabitant" or "[a] person with whom the respondent is having or has had a dating or engagement relationship."

justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." As our Supreme Court has explained, "The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof. [Citation.] A condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .'" (*People v. Lent* (1975) 15 Cal.3d 481, 486, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.)

Here, the protective order in favor of T. R.[4] -- issued after defendant admitted he violated probation by committing a domestic violence offense against her -- forbade conduct by defendant that was reasonably related to future criminality. Accordingly, it was a valid condition of probation under section 1203.1.

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[4] In answering the question of whether defendant violated a "lawfully issued" court order, we focus on the peaceful contact order the court issued after T. R. asked the court to drop the no contact order, because the peaceful contact order was the one in place on April 18, 2009.

Defendant argues that whether the trial court might have issued the protective order under section 1203.1, it did not do so; instead, in defendant's view, the trial court "acted only under section 1203.097." In support of this assertion, defendant relies on the fact that the court issued the protective order "on Judicial Council form number CR-160," which "is the form used to issue pretrial protective orders under section 136.2 and posttrial protective orders under section 1203.097." Defendant also relies on the fact that the court "checked the box indicating that the authority [it] relied on was section 1203.097."

We are not persuaded that the trial court believed it was acting under the authority of section 1203.097 instead of the authority of section 1203.1. The court may have used form CR-160 not because it believed it was acting under section 1203.097 but because there is no Judicial Council form protective order that indicates the order is being issued as a general term of probation under the authority of section 1203.1. Furthermore, the court may have checked the box it did, indicating the protective order was an "ORDER POSTTRIAL PROBATION CONDITION," only to make it clear that the court was not issuing an "ORDER PENDING TRIAL" -- the only other option on the form -- and not to indicate that it thought it was acting under section 1203.097.

Additionally, in determining what authority the trial court believed it was acting under, it is significant to note that section 1203.097 does not simply give a court *authority* to

impose a protective order; it makes a protective order *mandatory* under the circumstances described in the statute. Thus, there is a difference between issuing a protective order under section 1203.097 and issuing one under section 1203.1. In the record before us, we find nothing to suggest the trial court believed it *had* to issue a protective order under section 1203.097, as opposed to *choosing* to issue one under section 1203.1. As we have noted, the no contact order was issued by agreement, after defendant admitted he violated the terms of his probation by committing a domestic violence offense against T. R. When T. R. asked the court to drop that order, the court issued a peaceful contact order in its place. In neither instance was there any suggestion the court believed it was under a duty to issue a protective order in favor of T. R.

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "[A]ny uncertainty in the record must be resolved against the defendant." (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549.) Moreover, "'"a trial court is presumed to have been aware of and followed the applicable law."'" (*Ibid.*)

Here, on the record before us, we are not persuaded that the trial court mistakenly issued a mandatory protective order under section 1203.097, rather than properly issuing a discretionary protective order as a condition of probation under section 1203.1. In any event, even if we were to agree with

defendant that the trial court "acted only under section 1203.097," it would make no difference because "'"[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."'" (*People v. Zapien* (1993) 4 Cal.4th 929, 976.) In other words, it does not matter that the trial court may have mistakenly believed section 1203.097 gave it authority to issue the protective order, because section 1203.1 provided that authority. Thus, the order was "lawfully issued," regardless of whether the trial court acted under the wrong statute.[5]

Defendant contends this conclusion contravenes this court's decision in *People v. Selga* (2008) 162 Cal.App.4th 113. In *Selga*, the defendant pled guilty to stalking his ex-girlfriend (among other crimes), and the trial court issued a criminal protective order under section 1203.097 to protect her current boyfriend. (*Id.* at pp. 115-116.) On appeal, the defendant contended the protective order was invalid. (*Id.* at p. 116.) This court agreed, noting that the current boyfriend did not qualify for protection under section 1203.097. (*Selga*, at

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[5] Because we conclude the protective order was lawfully issued, we reject defendant's request that it be stricken.

p. 120.) The court also rejected the People's argument "that since the condition could have been imposed under section 1203.1, there [wa]s no prejudice." (*Ibid.*) In the court's view, there *was* prejudice because "a violation of [a] restraining order may be punished as a contempt of court, a misdemeanor or a felony," and "[b]y contrast, for conduct which is not otherwise criminal, . . . a stay-away order imposed as a condition of probation is not punishable as a separate offense." (*Ibid.*, citing *People v. Johnson* (1993) 20 Cal.App.4th 106, 112.) Instead, the ramification of a violation of a condition of probation is that probation may be revoked. (*Selga*, at p. 120.) Accordingly, the court struck the criminal protective order, but remanded the case to the trial court "to exercise its discretion on whether to impose a similar stay-away order as a condition of probation under Penal Code section 1203.1." (*Selga*, at p. 121.)

Defendant contends that just as this court rejected the People's reliance on section 1203.1 in *Selga*, the People "should not be heard to argue [here] that the trial judge could have issued a peaceful contact order pursuant to section 1203.1." He argues that, just like the defendant in *Selga*, he is prejudiced by the protective order because "if [T. R.] makes an allegation of abuse, [he] is in danger of new criminal charges being filed."

We are not persuaded. In deciding that the trial court abused its discretion in issuing a protective order under section 1203.097, when it might have issued the same order under

section 1203.1, the court in *Selga* did not consider the fundamental principle from *Zapien*, upon which we rely here, that a decision correct in law will not be disturbed on appeal merely because it was given for a wrong reason. This leads us to another fundamental principle -- "an opinion is not authority for a proposition not therein considered." (*Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Because the court in *Selga* did not consider whether the protective order could be upheld under the principle from *Zapien* of "right for the wrong reason," and because *Selga* involved a challenge on direct appeal from the imposition of the protective order -- and not, as here, a challenge to a revocation of probation based on a previously unchallenged protective order -- we conclude that *Selga* is not persuasive authority on the question of whether the order before us was "lawfully issued."

As for defendant's fear that, as a result of the protective order, he may be criminally prosecuted at some point in the future for what would otherwise not be considered criminal conduct, that fear is misplaced. We take it as a given that defendant cannot be criminally prosecuted under section 166 (or any other similar statute) for otherwise noncriminal conduct that violates the protective order imposed on him as a condition of probation. (See *People v. Johnson*, *supra*, 20 Cal.App.4th at pp. 112-113 & fns. 4 & 5.) Instead, as explained in *Johnson*, the ramification of any such violation is as "stated by the court and established by statute, i.e., that probation may be revoked." (*Id.* at p. 112.)

That is exactly what happened here: defendant violated the terms of his probation by assaulting T. R. (because in doing so he did not "[o]bey all laws applicable to [him]"), and as a result the court revoked his probation, terminated his participation in drug treatment under Proposition 36 (because it was his third violation of probation), and required him to serve the jail term that previously had been suspended. There was no error in the trial court's actions.

II

The Trial Court's Comment On Defendant's Statement To Police

At the probation revocation hearing, Sacramento City Police Officer Edward Brown testified that he responded to a call of a "domestic situation" in downtown Sacramento on April 18, 2009. At the scene, T. R. told Officer Brown that when she tried to leave defendant, he threw her to the ground and punched her three times in the chest.

At the hearing, T. R. told a different story about the incident, saying she thought she "had a seizure." She denied telling the police that defendant threw her down and punched her.

Sacramento City Police Officer Tristan Piano testified that he took a statement from defendant at the scene of the April 18 incident. Defendant did not tell Officer Piano that T. R. had a seizure; instead, he told the officer he and T. R. were having an argument and he pushed T. R. away after she came at him. He tried to grab her to keep her from falling, but she fell to the ground anyway.

In closing argument, defense counsel argued "[t]he only actual percipient witness to events was [T. R.]" In finding that defendant had violated the terms of his probation, the court said, "There was a second percipient witness here. It was defendant himself when he spoke to the police officer and did not describe a seizure, described the fight."

On appeal, defendant argues that this comment by the trial court amounted to a *finding* that defendant's statement to police corroborated the allegation against him that he had a "fight" with T. R. Based on that characterization of the court's comment, defendant argues that the court "(1) either . . . misinterpreted what [he] said; or, (2) . . . misinterpreted the law as applied to his statement," because "the incident [defendant] described was not a 'fight,' and would not have been a violation of section 166, subdivision (a)(4)."

We are not persuaded. The trial court's comment was not a finding that defendant's statement to police corroborated the allegation that he violated the terms of his probation by fighting with T. R. Instead, the court was merely commenting on the fact that defendant was a percipient witness to the incident also, and his statement to police did not corroborate T. R.'s trial testimony that she had a seizure because that is not what defendant told the police; instead, he told them he and T. R. were having an argument and he inadvertently pushed her to the ground. The fact that defendant did not corroborate T. R.'s seizure story and instead admitted arguing (i.e., fighting) with T. R. only served to support the trial court's implicit finding

that T. R. told the truth at the scene when she told police defendant pushed her to the ground, then hit her.

In summary, we find no error or insufficiency of the evidence in the finding that defendant violated the terms of his probation.

III

Custody Credits

At the end of the probation revocation hearing, the court noted that defendant was entitled to 49 days of custody credit against his jail term. Defendant subsequently submitted a letter summarizing his periods of custody from July 16, 2008 through June 15, 2009 (the day before the probation revocation hearing). He asserted he was entitled to a total of "107 days time served credits" based on the periods of custody.

On the same day the trial court filed defendant's letter, it issued an amended minute order to reflect that defendant was entitled to 107 days of custody credits as of June 16, 2009.

On appeal, defendant contends he is entitled to additional custody credits under the amendments to section 4019, effective January 25, 2010. We conclude the amendments apply to all appeals pending as of January 25, 2010. (*In re Estrada* (1965) 63 Cal.2d 740, 745 [amendments lessening punishment for crime apply to acts committed before enactment, provided the judgment is not final]; *People v. Hunter* (1977) 68 Cal.App.3d 389, 393 [applying *Estrada* to amendment involving custody credits]; *People v. Doganiere* (1978) 86 Cal.App.3d 237 [involving conduct credits].) Defendant is not among the prisoners excepted from

the additional accrual of credit. (§ 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant, having served 107 days of presentence custody, is entitled to 106 days of conduct credits.

DISPOSITION

The revocation of defendant's probation is affirmed, but the case is remanded to the trial court with instructions to grant defendant 106 days of presentence conduct credits.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.